Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STEVEN M. HENDRICKSON, SR., Petitioner

v.

CITY OF SANTA ANA, DAVID REAM,
and DAVID GROSSE, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS F. MOSS
Attorney at Law
15060 Ventura Blvd., Ste. 490
Sherman Oaks, CA 91403
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QUESTIONS PRESENTED FOR REVIEW

1. Is a City employee's "speech" protected by the First Amendment of the United States Constitution:

a. When his "speech" is directed to the City Council and Vice Mayor of he City and addresses the Civil Service System passed into law by the voters;

b. When it requests hearings be held and reccmmendations be made for necessary changes to the City Code on personnel matters;

c. When it calls for better checks and balances on personnel matters within the City;

d. When it asserts the violation of numerous Municipal Code and City Charter provisions;

e. When it seeks compliance with Municipal Code and City Charter provisions;

f. When it calls for Court Magistrate control of personnel matters;

g. When it alleges age discrimination;

h. When it seeks compliance with federal and state laws;

i. When it seeks improvement of Civil Service testing and selection processes; and

j. When the speech of the employee has not created actual disruption?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Steven M. Hendrickson, Sr., and the Respondents, City of Santa Ana, David Ream (City Manager), and David Grosse. All Respondents in the court below remain Respondents in this action.

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The Petitioner, Steven M. Hendrickson, Sr., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on April 23, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

The Decision of the United States District Court for the Central District of California (Pfaelzer, D.J.) has not been reported. It is reprinted in the appendix hereto, p 16a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 USC Section 1983, the Petitioner brought this suit in the Central District of California. On January 31, 1991, the Central District rendered Judgment in favor of Respondents. See p. 16a, infra.

On Petitioner's appeal, the Ninth Circuit on April 23, 1992, entered a Judgment and an Opinion affirming the Central District's Judgment, finding that Petitioner's "speech" was not protected.

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See p. 1 a, infra. No Petition for Rehearing has been filed.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution Amendment 14 Section 1 provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves the last vestige of accountability in government bureaucracy, the rights of a courageous employee to speak up when he perceives wrongdoing.

Petitioner was an employee of the City of Santa Ana from 1968 - 1987, when he was discharged for words he wrote in letters and in grievances. In 1987, Petitioner instituted this action, alleging that his rights under the United States Constitution to speak freely, and petition the government for redress of grievances was denied when he was discharged from employment for words he had written to City leaders.

Although the writings disclose that Hendrickson was unhappy with employment decisions that had been made that adversely impacted his advancement within the City of Santa Ana, the writings disclosed law

violations by people in power, and a desire for change in City personnel practices for the benefit of the City as a whole. The writings for which Hendrickson was ultimately fired included a letter to a Deputy City Manager in May of 1986, a letter to the Mayor and City Council in September 1986, a Third Step Grievance written in March of 1987, and a letter to the Vice Mayor and City Council members written in March of 1987.

The final letter, dated March 7, 1987, provided:

"Dear Vice Mayor McGuigan,

Thought I would like to keep you up to date on my employment with the City; therefore, I am providing you with a copy of my Step 3 Grievance.

One of my primary requests is that the Grievance be thoroughly reviewed by the City's Personnel Board with open hearings and recommendations to the City Council

/ / /

regarding necessary changes to the City Code on Personnel matters.

Management should not object to such a reasonable request. In my opinion, the City needs better checks and balances on Personnel matters.

Sincerely,

Steve Hendrickson

cc: Records
All Council Members"

The Third Step Grievance, which had been sent with the foregoing letter, contained a substantial amount of public speech as well.

The Third Step Grievance:

a. Cites numerous public laws, Charter provisions and Municipal Code sections passed by the voters and City Council that Hendrickson wanted enforced, and Hendrickson claimed had been violated;

b. Points out that Citywide (not just in positions Hendrickson applied for) "temporary" and "emergency" appointments in

the Civil Service have extended beyond their statutory limits;

c. Claims that the City engages in age discrimination;

d. Claims a failure of the City to comply with the requirements of federal and state laws, the City Charter, and the Municipal Code is continuing to impact Hendrickson and all similarly situated Civil Service employees;

e. Asks for compliance with all Civil Service requirements;

f. Asks for remedies related to all recruitments and promotions in the City Service;

g. Asks for anonymity in the employment exam process, and a bonafide point system in selections;

h. Asks for changes in the City Code and termination of all temporary and emergency appointments in the City that have extended beyond the statutorily mandated number of calendar days;

i. Seeks an investigation of the possible imposition of penalties as set forth in the City Charter for anyone found to have violated the Charter; and

j. Seeks investigation of the possibility of placing the Human Resources Agency within the City under the supervision of a Court Magistrate until it can be shown affirmatively that the City is in compliance with all provisions of federal and state laws, the City Charter and Municipal Code.

The trial judge pointed out that prior to the Third Step Grievance there was a May 19, 1986 letter to the Executive Director of Human Resources, a letter sent the same day to the Director of Human Resources, and a September 26, 1986 letter to the Mayor and City Council. As to these prior letters, the District Judge found that they had not been discovered by David Grosse, Hendrickson's department head, until he investigated the Second Step Grievance

(after January 8, 1987), and the District Court Judge found that no one went to Grosse to complain about the letters, or recommend Hendrickson for discipline for sending them. There was no evidence that the 1986 letters even threatened to be disruptive. Grosse's response to the 1986 correspondence was that Hendrickson should be counseled for his attitude. Counselling was testified to as the mildest form of discipline (The last of the 1986 letters, written to the Mayor and City Council is discussed infra).

On the issue of actual disruption, the discussion in the lower court decisions focused on the impact of the Third Step Grievance and letter to the Vice Mayor and City Council, both written in March, 1987.

The District Court Judge found:

"David Grosse, Hendrickson's appointing authority and the individual responsible for his termination, was not able to provide any concrete examples of

disruption related to Hendrickson's speech."

* * * * *

"David Ream, the City Manager, also testified that Hendrickson was disruptive, although he was not able to provide concrete examples either. Pam Lucado, Hendrickson's direct supervisor at the time of his termination, did not testify to any disruption, but did conclude that the accusations made against her in the Third Step Grievance had made it impossible for her to supervise him in the future."

The District Court Judge found that there was not actual, material, and substantial disruption caused by Hendrickson's speech.

The Court of Appeal found that when speech involves a personal employment dispute it weighs against a finding that the speech addresses a public concern, and that Hendrickson's speech therefore was of minimal public concern.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEAL HAS WRONGFULLY EXTENDED CONNICK V. MYERS 461 U.S. 138 (1983) TO A CASE WHERE THE "CONTENT" AND "CONTEXT" OF THE SPEECH ARE FUNDAMENTALLY MORE PUBLIC THAN THE SPEECH IN CONNICK V. MYERS.

A. Hendrickson's Speech Was For More Public Than Myers' Speech In Connick.

This court has periodically reviewed and refined the constitutional right of public employees to speak out on matters which concern them.

"Twenty years ago, the Supreme Court held that an individual's exercise of his or her 'right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.' Pickering v. Board of Education 391 U.S. 563, 574 . . . (1968)." Roth v. Veteran's Admin. 856 F2d 1401, 1404 9th Cir. 1988.

In Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), this

court set forth the parameters for determining when speech addresses matters of public concern. The court stated that the reviewing court must characterize the speech in question by looking at its content, form, and context in light of the entire record. Id, at 147, 148, 103 S.Ct. at 1690-1699.

"In evaluating the content of the speech, courts have recognized certain subjects as inherently of public concern. For example in Givhan v. Western Line Consol. School Dist. 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), the court held that a public school teacher's private comments to the school principal charging racially discriminatory policies and practices within the district were public expression warranting protection under Pickering. Id, at 412-415 . . . The Connick court characterized Givhan's allegations of racial discrimination as 'a

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matter of inherently public concern'. . ." Roth, supra 856 F2d at 1405.

Connick indicated that a distinction must be made between speech that seeks to bring to light actual or potential wrongdoing or breach of public trust on the one hand and speech that merely reflects one employee's dissatisfaction with his employment on the other. Connick 461 U.S. at 148.

Analyzing the plaintiff's conduct in Connick, the court in Roth pointed out that the plaintiff in Connick, Myers, "had not sought to notify the public that the D.A.'s office was remiss in performing its duties. Nor had she attempted to expose any possible misfeasances on the part of Connick - the District Attorney - or others." Roth, 856 F2d at 1405.

Hendrickson, by contrast, throughout the writings that caused his discharge, is addressing public concerns at the heart of the City's personnel system, a system

implemented by the voters through Charter provisions. While the court in Connick notes that Myers did not try to expose malfeasance of the D.A., Hendrickson did try to expose malfeasance in carrying out laws regulating personnel matters in City government. Hendrickson's speech, different than Myers, in the Connick case, is exposing malfeasance, corruption, discrimination, and other issues of public concern. Hendrickson proposes solutions of general applicability, and most importantly his "speech" is directed to the City Council and Mayor. Hendrickson's speech was clearly public, albeit prompted by his own concerns.

The "public" nature of Hendrickson's speech is belied by the fact that the public issues his speech addresses involve the mundane world of City Codes and City Charter provisions dealing with a merit Civil Service System. The violation of these laws and Charter provisions, and

the desire for improvement of the merit system in the City, expressed by Hendrickson, are necessarily public, at the heart of the day to day operation of the government. The development of merit Civil Service Systems in our country reflected a popular rejection of "spoils" and "favoritism" in public employment, and in the case of many voter enacted Civil Service Systems, a public regard for length of service in the government employment process.

Hendrickson's speech addressed much more than a mere workplace spat. It addressed the violation of laws the public enacted, and addressed a desire that the system of public emploment be improved. Hendrickson addressed his speech to those who govern, the ultimate arbiters of the public will. By way of contrast Myers, in Connick, addressed her "speech" to co-workers.

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The letter to the Mayor and City Council of September 23, 1986 addresses a number of public issues. The letter speaks of "unpalatable personnel practices" generally, and mentions that these practices are "affecting many other City personnel as well". It addresses poor morale of City employees and attrition of City employees - clearly an issue of public concern.

In the September 23, 1986 letter, and after stating facts he is familiar with, Hendrickson asks the following public issue question to the Mayor.

"Does that sound like the way you want to recruit your personnel?" The inference being that if poor or illegal means are used to recruit personnel, the City, the public, will suffer.

After describing his personal experiences to the Mayor and Council, Hendrickson addresses the integrity of the

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government's hiring process and recruitment generally:

"May I suggest that you use some reputable and honest way of recruiting personnel for white collar miscellaneous employees of the City. . .

I am certain that the quality of your personnel would not decrease, and you would foster better moral among your existing personnel.

Thank you so much for your indulgence. Employees of the City really do need you to take a greater interest in the way things are done, particularly the hiring of personnel. The practices that exist may be acceptable for small corporations, but I believe they are not only improper, but illegal for a government entity. The practice of friends hiring friends through illegal procedures - very simply put - is wrong."

The "public nature" of the Third Step Grievance is fully set forth in the

Statement of the Case, supra. It cannot be emphasized enough that Petitioner made the Council and Vice Mayor a recipient of the Third Step Grievance, and that in the Grievance, Petitioner was pointing out perceived law and Charter violations, the need for improved recruitment methods, and discrimination. In the grievance, much of what he was seeking was reform in the Civil Service System of the City generally.

Whereas Hendrickson made a quintessentially public appeal to the City Council and Mayor:

". . .One of my primary requests is that the grievance be thoroughly reviewed by the City's Personnel Board with open hearings and recommendations to the City Council regarding necessary changes to the City Code on personnel matters.

Management should not object to such a reasonable request. In my opinion, the City needs better checks and balances on personnel matters" (March, 1987 letter);

Meyer in Connick did not come close to such a public appeal.

The purpose in communicating to the Council is to change the law and provide checks and balances on matters exclusively public.

B. Hendrickson's Personal Stake In His Public Speech Should Not Detract From His Rights.

Although plaintiff did have his own ax to grind, it is clear that Hendrickson addressed, through his writings, broad issues of public concern regarding integrity in application of the Charter and City Code, needed improvement in City personnel practices and laws, discrimination, employee morale, and causes, effects, and examples of the issues he was concerned with. In raising these issues he spoke of his own experience and the experience of others. The remedies he sought included several remedies for the benefit of the City as a whole. He did not

incite his co-workers or ever stop performing his job.

The fact that an employee has a personal stake in a matter that relates to an issue that is also public should not and cannot defeat his right to First Amendment protections. Even in Connick, where this court pointed out that Myer's "speech" was motivated by a personal dispute, one of the issues was found to relate to public concern, and the Supreme Court allowed the First Amendment analysis to proceed to the next step on that public issue.

The Seventh Circuit corectly pointed out that those who speak out on public issues will necessarily have private concerns as well.

"Despite the court's explicit finding that Meyer's questionnaire [in Connick] was motivated by a personal dispute, the content of her speech was paramount to the court's finding that a public issue was implicated. This court also has recognized

that content is the greater single factor in the Connick inquiry.

We must recognize that employees who have no disagreements with the manner in which an institution is run are unlikely to see any problems in need of public attention. As a result, these types of First Amendment cases typically include disgruntled employees. If employees are automatically denied First Amendment protection simply because they are involved in some type of dispute with their employer, serious issues of public concern will never be brought to light." Belk v. Town of Minocqua 858 F2d 1258, 1264 (7th Cir. 1988). (Emphasis added).

C. Actual Disruption Is Required Where The "Speech" Is Far More Public Than The Speech At Issue In Connick.

Pickering requires that the court balance the right of the government employee to comment on matters of public concern against "the interest of the State,

as an employer, in promoting the efficiency of the public services it performs through its employees". Pickering, 391 U.S. at 568, 88 S.Ct. at 1734, 1735. This balancing presents a legal question. Roth, supra at 1407.

The Ninth Circuit has held,in a case different than the instant case, that:

"For us to find that the government's interest as an employer in a smoothly running office outweighs Roth's [the employee's] First Amendment right, defendants must demonstrate actual, material, and substantial disruption." Roth, 856 F2d at 1407 (Emphasis added).

Although in Connick the court indicated that when close working relationships are an issue, a wide degree of deference to the employer is appropriate, 461 U.S. at 151-152, the court stressed that the government's burden in justifying a termination depends on the nature of the employee's expression:

"The states burden in justifying a particular discharge varies depending upon the nature of the employee's expression." Connick 461 U.S. at 150, 103 S.Ct. at 1692. Also see footnote 9 to Connick.

The public nature of the public speech and scope of the speech are important factors. In Connick the court noted:

"We caution that a stronger showing (of disruption) may be necessary if the employee's speech more substantially involved matters of public concern." Id, at 152. Hendrickson's speech is far more public than Myer's speech in Connick.

Myer's questionnaire in Connick touched upon matters of public concern in only a most limited sense, thereby limiting the amount of disruption that had to be tolerated. Id, at 154.

In Connick, the court noted that the communication was disruptive because unlike Pickering the "speech" went to all of

plaintiff's co-worker's, and required co-workers to fill out a questionnaire. Hendrickson limited his audience to officials.

The District Court and the Ninth Circuit found no "actual" disruption in the instant case, but held that actual disruption is not necessary because the speech in the instant case was improperly likened to the limited public speech in Connick. The difference in the public "speech" in this case and in the Connick case is extreme, and cannot be ignored.

"An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office." Roth, supra 896 F2d 1407 through 1408.

The Supreme Court in Rankin v. McPherson, 107 S.Ct. 2891 (1987) pointed out:

"Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." Id, 2896.

In Rankin, supra (decided after Connick) this court stated:

"The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. 'Debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . ..' (Cites omitted). 'Just as erroneous statements must be protected to give freedom of expression the breathing

space it needs to survive, so statements criticizing public policy and the implementation of it must similarly be protected.' Rankin, supra 107 S.Ct. at 2898.

The court in Rankin went on to engage in the balancing test of public interest versus efficient functioning of the department, and held for First Amendment protection, finding that there is no evidence that the "speech" interfered with the efficient functioning of the office.

A similar conclusion is warranted in this case. Hendrickson's speech, unpopular with his supervisors, was still necessary to an exposure of unlawful corruption of the City's mandated Merit System, and it did not cause actual disruption.

The case of American Postal Workers v. United States Postal Service 830 F2d 294 (D.C. Cir. 1987) offers useful insight into the First Amendment issues raised by this case. In Postal Workers, the court held

that the employer had to show concrete harm by the "speech" if the balancing test would yield a result against First Amendment interests. Id, at 303. To support this finding, the D.C. Circuit pointed out in Fn. 12 Id at 303-304, how Pickering required proof that school board operations were disrupted, how Rankin required evidence of "harm", and presumed harm was not enough, and "objective evidence" of negative impact was necessary. In the same footnote Postal Workers indicates that:

Jangels v. Pierce 825 F2d 1127, 1132, slip op at 7 (7th Cir. 1987) holds that speculation concerning public perceptions and impact, without evidence is insufficient to overcome First Amendment claims. Brasslet v. Cota 761 F2d 827, 845 (1st Cir. 1985) quoting Key v. Rutherford, 645 F2d 880, 885 (10th Cir. 1981) holds that "Operational efficiency objections must be real and important before they can

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serve as a basis for discipline or discharge of a public employee."

The need for actual disruption was also set forth in Roth, supra (9th Cir. 1988) and other cases (See for additional cases, Fn 13 of Postal Workers. In Postal Workers, at Fn 13 the court expressly rejects a reading of Connick that allows for "presumed disruption" to be a factor in any case where the public issue is not as isolated and narrow as in Connick).

The fact that Hendrickson's comments were heard by a limited audience is a factor that also weighs in his favor. As in Rankin, the general public was not apprised of Hendrickson's comments, and his letters and grievances were not widely disseminated. See Fn 15 Postal Workers.

Here it cannot be emphasized enough that there is simply and absolutely no evidence of actual disruption. Self serving statements of an inability to supervise, without concrete evidence cannot

cause a public employee to lose his right to speak out on problems with the government that employs him.

To allow this decision to stand, would chill the exercise of First Amendment rights of any government employee who sees violations of law in the workplace.

2. THERE IS A CLEAR CONFLICT IN THE CIRCUITS ON THE ISSUE OF THE DEGREE OF DISRUPTION THAT MUST BE DEMONSTRATED IN THE FACE OF PUBLIC SPEECH TO CAUSE A PUBLIC EMPLOYEE TO LOSE THE PROTECTION OF THE FIRST AMENDMENT.

The case of Connick v. Myers, supra, clearly allowed presumed disruption to cause "speech" to lose its First Amendment protections where the underlying speech was of a minimal public nature. Since Connick was decided, courts have typically required evidence of disruption, not speculation, where the "speech" is more public than the speech in Connick.

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American Postal Workers v. United States Postal Workers, 830 F2d 294 (D.C. Cir. 1987) - Concrete harm.

Jangels v. Pierce 825 F2d 1127, 1132 (7th Cir. 1987) - Speculation conceiving impact is insufficient to overcome First Amendment rights.

Brasslet v. Cota 761 F2d 880, 885 (10th Cir. 1981); and Key v. Rutherford 645 F2d 880, 885 (10th Cir. 1981) - Operational efficiency objections must be real and important.

The 9th Circuit in Roth, supra required actual, material, and substantial disruption.

In contrast to the foregoing decisions, is the decision in the instant case, where there clearly is public speech well beyond Myers speech in Connick v. Myers, and self serving speculation over an inability to supervise was held sufficient to cause a long term employee to lose his First Amendment protection, even

though the District Court found no concrete or actual disruption caused by the "speech".

CONCLUSION

This case presents the court with issues it has yet to decide. The clearest questions involve application of this court's decisions in Pickering, Connick, and Rankin to the "speech" of a public employee to government officers about public law abuse impacting the speaker and other public employees. The facts of this case compel answers to questions left unanswered by Connick, such as whether presumed disruption is enough to tilt the balance against First Amendment protection where the speech of the public employee, content and context, is far more public than the speech at issue in Connick.

This case is of national significance in that the public sector is an employer of millions of employees, and the accountability of those in positions of

power will necessarily turn on the degree to which public employees may speak up on public issues uninhibited by the prospect of employment termination.

Date: July 21, 1992

Respectfully submitted,

DENNIS F. MOSS
Attorney for Petitioner

Filed April 23, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN M. HENDRICKSON SR.,	)	NO. 91-55256
	)	D.C. NO. CV 87-2801 MRP
Plaintiff-Appellant,	)	
	)	MEMORANDUM*
vs.	)	
	)	
CITY OF SANTA ANA, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court For the Central District of California
Mariana Pfaelzer, District Judge, Presiding

Argued and Submitted February 3, 1992
Pasadena, California

Before: CHIEF JUDGE WALLACE, and BROWNING and FERGUSON, Circuit Judges

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Steven M. Hendrickson appeals the district court denial of various claims arising from his employment termination. We affirm.

BACKGROUND

Steven Hendrickson, a forty-nine year old white male, was fired by his employer, the City of Santa Ana. Hendrickson filed suit in federal court, claiming that the City terminated him for exercising his First Amendment rights in violation of 42 U.S.C. Section 1983. Hendrickson also claimed that his discharge violated the anti-retaliation provisions of the Age Discrimination in Employment Act, 29 U.S.C. Section 623(d), and the California Fair Employment and Housing Act, Cal. Gov't Code Section 12940(f).

The City hired Hendrickson as a draftsman in 1968 and promoted him to Engineering Draftsman in 1977, and then to Assistant Transportation Planner in 1982. During the course of his employment,

Hendrickson applied for and was denied other promotions. Appellee David Grosse was employed as the Executive Director of the City's Public Works Agency and personally fired Hendrickson. David Ream was the City Manager.

Hendrickson claimed that he was denied various positions as a result of age and sex discrimination and that the City engaged in illegal hiring practices. He alleged that "sweetheart deals" were made between management and individuals less qualified than he. He contended that the City violated civil service preferences in various other ways. He wrote a series of letters containing these allegations to city officials, initiated a formal grievance procedure and ultimately was terminated.

The City's Administrative Board (the "Board") upheld the firing based on five of the original seven counts, and dismissed the remaining two counts. During the

pendency of this federal action, Hendrickson pursued a writ of mandamus to overturn the Board's decision in state court. The state action culminated in a court of appeal judgment in December 1991, invalidating three of the five grounds of his termination. Appellant then filed a motion in this court to remand the action back to district court after the state court of appeal decision became final.

DISCUSSION

1. Standard of Review

Our standard of review of the district court's findings of fact is clear error. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). We review the legal conclusions to be drawn from those facts under a de novo standard. Connick v. Myers, 461 U.S. 138, 150 n. 10 (1983).

2. First Amendment

To receive First Amendment protection, Hendrickson's speech must be shown to involve a matter of public interest.

Connick, 461 U.S. at 146. If some degree of public interest is involved, Hendrickson must go on to show that "his interest as a citizen in commenting upon matters of public concern outweighs any adversely affected interest of the City in promoting efficient delivery of public services." Gillette v. Delmore, 886 F2d 1194, 1197 (9th Cir. 1989).

The content of Hendrickson's speech was of limited public interest. Although the speech touched on matters of public concern such as discrimination and illegal hiring practices, these issues were discussed almost entirely in the context of his personal disputes with the City over his own employment situation. When the speech at issue involves a personal employment dispute or was precipitated by adverse actions of an employer, this weighs against a finding that the speech addresses matters of public concern. Roth v. Veteran's Admin. of Government of U.S., 856

F2d 1401, 1406 (9th Cir. 1988). See also Connick, 461 U.S. at 153. The content and context of Hendrickson's speech thus justifies the conclusion that it was of limited public concern.

We next weigh the City's interest in efficient delivery of public services against the minimal public interest involved in Hendrickson's speech. The district court found that Hendrickson's speech destroyed working relationships with some of his superiors and threatened to hinder the operation of his department. This finding was not clearly erroneous. It is supported by the testimony of his superiors, David Grosse, David Ream, Pam Lucado, and George Alvarez. Although none of them testified to "actual disruption," this is not always required. We have held that where public concern issues do not predominate in the speech at issue, "actual, material and substantial" disruption is not required. Roth v.

Veteran's Admin. of Gov't of United States, 856 F2d 1401, 1407 (9th Cir. 1988). When we balance the interests involved, we find no First Amendment violation.

We acknowledge the importance of allowing employees to air grievances in matters of public concern. Nevertheless, Hendrickson's right to express dissatisfaction, caused largely by his failure to be promoted, is outweighed by the City's interest in promoting efficiency in the public services it performs.[1/] We hold his termination did not offend the First Amendment.

3. Due Process

Hendrickson claims that his termination violated due process because there was no notice that his actions could result in termination. We uphold the district court and agree that

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1/As such, we need not apply the test set forth in Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

Arnett v. Kennedy, 416 U.S. 134 (1974), controls the result for this claim. In Arnett, removal or suspension "for such cause as will promote the efficiency of the service" was held by the Court to be constitutional although it is an "admittedly general standard." Id. at 159. Therefore, under Arnett, the City Charter provision at issue here[2/] does not offend due process.

4. Denial of Right to Petition

Hendrickson contends that the termination, based in part upon his writing to city officials, violated his First Amendment right to petition the government. Statements made in a petition are not afforded greater constitutional protection than other First Amendment expressions. McDonald v. Smith, 472 U.S. 479, 485 (1985). For this reason, Hendrickson's

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2/Santa Ana City Charter Section 1000(d) permits dismissal for "reasonable and sufficient cause."

right to petition claim fails for the same reasons that his other First Amendment claim fails.

The fact that Hendrickson was protected by an anti-retaliation provision in his union's agreement with the City does not strengthen this claim. Hendrickson's remedy for a violation of that provision is a state court action to enforce the agreement. We note that he has pursued his state remedy.

5. Violations of ADEA and FEHA

Hendrickson charges that he was terminated in retaliation for his claims of age discrimination, in violation of 29 U.S.C. Section 623(d) and Cal. Gov't Code Section 12940(f).[3/] Because Hendrickson's discharge notice included his charge of age discrimination as one of the grounds for

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3/Hendrickson makes no arguments based on the California statute and has therefore forfeited his claim. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

his dismissal, Hendrickson has made a prima facie showing of age discrimination under Wrighten v. Metropolitan Hosps., Inc., 726 F.2d 1346, 1354 (9th Cir. 1984).

However, this prima facie showing can be rebutted. Where a plaintiff makes a prima facie case, the burden of production shifts to the defendant-employer to articulate a legitimate, non-retaliatory reason for the discharge. If the employer can do so, the burden of production shifts back to the plaintiff to show that the proffered explanation was merely pretextual. Miller v. Fairchild Indust., Inc., 885 F.2d 498, 504 n.4 (9th Cir. 1989), cert. denied, 494 U.S. 1056 (1990). The City could meet its burden by showing Hendrickson's belief as to the discrimination, or his oppositional conduct, was unreasonable, or that there was a legitimate reason for his discharge. See Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (as to

belief) and Wrighten, 726 F.2d at 1354-55 (as to conduct).

The district court found that the City had a legitimate reason to discharge Hendrickson because his belief that he was being discriminated against was unreasonable. We review this factual finding for clear error. Wrighten, 726 F.2d at 1346.

The district court noted that age discrimination was not the thrust of Hendrickson's complaint with the City; he did not mention it in any of his letters to the various city officials. Hendrickson made the age discrimination claim for the first time in his Third Step Grievance. Further, the district court found that Hendrickson made serious allegations against the City based on assumptions, without investigating first to see whether there was any truth to them. Had Hendrickson inquired first, he would have discovered that in fact six of the

positions he was denied were offered to persons in their forties or fifties.

We agree that under these facts, Hendrickson's belief was unreasonable and the City had a legitimate non-retaliatory reason to dismiss him. The district court's factual findings here are not clearly erroneous.

6. Violation of Public Policy

Hendrickson claims that his termination violated public policy because his speech concerned the integrity of the voter validated merit civil service system. The district court rejected this claim and we agree.

We review a district court's interpretation of state law de novo. Matter of McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc). The termination of one who discloses illegal, unethical or unsafe practices is against public policy. Foley v. Interactive Data Corp., 47 Cal.3d 654, 669, 765 P.2d 373, 378 (1988).

However, rather than disclose illegalities to the public, Hendrickson's speech contained unsubstantiated allegations based on his personal grievances. This does not implicate substantial public policy.

7. Motion to Remand

Hendrickson asks that we remand this case to the district court based on 28 U.S.C. Section 1738, the full faith and credit statute. He claims the district court should reconsider his federal claims based only on the grounds for termination the state court did not determine were invalid under state law.

In an action under Section 1983, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Under California law, a California state court decision has no res judicata effect

"during the pendency of and until the resolution of the appeal." Agarwal v. Johnson, 603 P.2d 58, 72 n.11 (Cal. 1979). Under California as well as federal law, a federal district court decision, once rendered, is final for res judicata purposes. See Calhoun v. Franchise Tax Bd., 574 P.2d 763, 765-66 (Cal. 1978) (federal rule is "judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside"; "federal judgment is as final in California courts as it would be in federal courts"). Thus, under California law, the district court was not required to give any state court judgment preclusive effect. Further, although the state court judgment became final during the pendency of this appeal, it cannot affect our decision. Under California law, the district court's decision on the claims

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at issue here precluded the state court from reconsidering them. See Id.

Affirmed.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVEN M. HENDRICKSON SR., an individual,	)	CASE NO. CV 87-2801 MRP
Plaintiff,	)	MEMORANDUM OF DECISION
vs.	)	
CITY OF SANTA ANA, a municipal corporation, et al.,	)	
Defendants.	)	

This matter came on for trial before the Honorable Mariana R. Pfaelzer on April 6, 1990, and was submitted pending the filing of additional briefs. After considering the additional briefs filed and exhibits submitted, the Court now renders its decision.

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Background

Plaintiff is a 48-year-old white male who was discharged from his position with the City of Santa Ana's Department of Transportation, after 20 years of employment with the City. Plaintiff applied for and was denied several promotions during the course of his employment. He claims that he was denied those positions as a result of reverse sex discrimination and age discrimination, and that the City has engaged in illegal hiring practices. According to Hendrickson, many of the positions for which he applied were given to individuals less qualified than he, who had "sweetheart deals" with managers. More specifically, he claims that managers have circumvented posting and testing procedures and civil service preferences by hiring their friends for "temporary" positions, making them the obvious choice when the positions were to be filled on a permanent basis. He

also contends that managers "rigged" oral boards in favor of their friends. Hendrickson expressed his dissatisfaction in numerous letters to various City officials, and availed himself of the formal grievance procedures specified in the Memorandum of Understanding ("MOU") between his union and the City. After the plaintiff made numerous complaints, taking his grievances all the way to the mayor, he was fired for insubordination.

Hendrickson filed this action May 19, 1987. On July 28, 1988, the Court issued a Memorandum of Decision ("1988 Memorandum of Decision") resolving a number of legal issues raised in the case. The parties submitted post-trial briefs on May 10, 1990. Plaintiff's fourth amended complaint states six claims: first, a Section 1983 claim, asserting that plaintiff was denied his civil rights in that he was discharged (a) for exercising his right of free speech, (b) for exercising his right to

petition the government for redress of grievance, and (c) in violation of his due process rights in that the discharge was made according to unarticulated, constitutionally vague standards, contrary to consistent city practice; second, a claim for violation of the Age Discrimination in Employment Act ("ADEA"), in that plaintiff claims that he was discharged in retaliation for protesting age discrimination prohibited by the ADEA, 29 U.S.C. Section 623(d); third, an analogous retaliation claim under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code Section 12940(f); fourth, a claim for breach of express provisions of the MOU between the City of Santa Ana and plaintiff's union and breach of the covenant of good faith and fair dealing implicit in the MOU; fifth, intentional infliction of emotional distress; and sixth, tortious wrongful discharge in violation of public policy.

Discussion

I. Section 1983

Plaintiff asserts three claims under Section 1983 - a First Amendment claim, a claim based on denial of the right to petition the government for redress of grievances, and a due process claim based on the void for vagueness doctrine.

A. The First Amendment Claim

1. The Standard Under Connick v. Myers

Plaintiff's first Section 1983 claim is based upon the First Amendment. Plaintiff contends that he was discharged in order to silence him from speaking out on issues of public concern. A two-part test must e applied to speech in the public workplace to determine whether that speech is protected by the First Amendment. The first part requires analysis of whether the speech involves a matter of public concern. The second part is a balancing test, weighing the employer's interest in

discharging the employee against the employee's First Amendment interests. Rankin v. McPherson, 107 S.Ct. 2891, 2896 (1987).

The Court, in its 1988 Memorandum of Decision, found that this case is closely analogous to Connick v. Myers, 461 U.S. 138, 140 (1983). It concluded that, like the speech in Connick, the speech in this case is of limited public concern. It implicates some issues of public concern - alleged discrimination and unfair hiring practices of a public employer. But for the most part, it is concerned with plaintiff's own personal employment dispute. The Court adopted the approach taken in Connick, proceeding to the balancing phase of the test since there was at least some issue of public concern involved.

The defendants bear a relatively light burden due to the limited public concern of the issues raised by Hendrickson. A "clear

demonstration that the plaintiff's speech 'substantially interfered' with office operations" is not required. 1988 Memorandum of Decision at 9; Connick, supra, 461 U.S. at 150.

Plaintiff argues that under Roth v. Veterans Administration, 856 F2d 1401 (9th Cir. 1988), a Ninth Circuit case handed down since the Court's 1988 Memorandum of Decision, the employer must show "actual, material, and substantial disruption." Id. at 1407. The Roth court did, in fact, hold that the defendants in Roth were required to make that showing. However, as the Supreme Court stated in Connick, and as this Court has already recognized, a public employer's burden in justifying a termination is a function of the extent to which the employee's speech implicates First Amendment interests. 1988 Memorandum of Decision at 9. Connick, supra, 461 U.S. at 152. Roth is simply an application of the rule enunciated in Connick. In Roth, a

physician hired by the Veteran's Administration as a troubleshooter was demoted and threatened with termination in response to his reporting of wastefulness, mismanagement, and ethical and statutory violations. Roth, 856 F2d at 1403-04. The Roth court concluded that the doctor's speech "predominantly concerned matters of public interest," justifying the application of a more onerous burden on the employer than the Court imposed in Connick. Roth, 856 F2d at 1407. The standard applicable in Connick is still the appropriate standard in this case.

2. Hendrickson's Speech

Hendrickson's speech is contained in several letters to City officials as well as complaints made in the course of the grievances process.

Cn May 19, 1986, Hendrickson sent a letter to Alex Sanchez, the Executive Director of Human Resources, objecting to his disqualification for the position of

Transportation Coordinator. Hendrickson charged Sanchez with giving jobs to women who had "sweetheart deals" with department heads to high ranking personnel and whose "qualifications were highly suspect," and claimed reverse sex discrimination.

On the same day, he sent a memorandum to Jan Perkins, Deputy City Manager, with a copy to Sanchez. Hendrickson stated that he would like to "work with you and the City before I go outside the organization, but you must understand that I've been pushed too far. I know something of the laws and know that I don't have to tolerate the treatment I've received."

On September 23, 1986, Hendrickson wrote a letter to Mayor Griset and members of the City Council charging illegal hiring of close friends and rigging of oral boards. That letter gave specific examples of individuals whom Hendrickson felt were hired due to their friendships with administrators, and suggested ways in which

he felt hiring procedures could be changed to prevent these unfair practices.

In December of 1986, Hendrickson took the first step of the formal grievance procedure prescribed in the MOU, by meeting with his immediate supervisor, George Alvarez. When the meeting did not yield what Hendrickson considered to be satisfactory results, he filed a Second Step Grievance on January 8, 1987. Hendrickson alleged violations of the Santa Ana Municipal Code and the MOU in denying civil service preferences and failure to conduct recruitments according to prescribed methods. He gave specific examples of illegal practices in recruitment for positions for which he had applied, including the appointment of Pam Lucado, a temporary employee, to the position of Development Engineer. The relief Hendrickson requested included monetary compensation, reclassification of his position to a higher level, imposition

of penalties on various City officials, termination of all emergency and temporary employees who have remained in those positions longer than the period permitted by statute, management restrictions regarding temporary assignments, anonymity for candidates undergoing oral examination and other changes in the recruitment process, and placement of the Human Resources Department under the authority of a magistrate.

3. Application of the Standard

At the Personnel Board hearing on Hendrickson's termination, David Grosse, Hendrickson's appointing authority and the individual responsible for his termination, was not able to provide any concrete examples of disruption related to Hendrickson's speech. It is also clear from Grosse's testimony that he did not hear about the letters until he investigated the Second Step Grievance and found them in Hendrickson's personnel file.

No one had gone to Grosse to complain about the letters, or recommend Hendrickson for discipline for sending them. Grosse did, however, testify repeatedly during the course of he Personnel Board hearings to his observation that Hendrickson's complaints created disharmony in the working environment. David Ream, the City Manager, also testified that Hendrickson was disruptive, although he was not able to provide concrete examples either. Pam Lucado, Hendrickson's direct supervisor at the time of his termination, did not testify to any disruption, but did conclude that the accusations made against her in the Third Step Grievance had made it impossible for her to supervise him in the future. George Alvarez, the City Traffic Engineer and Pam Lucado's direct supervisor, testified that Pam Lucado had indicated to him that she found it difficult to supervise Hendrickson because he had a "a chip on his shoulder" about the

fact that she was appointed Transportation Development Engineer instead of Hendrickson. Alvarez also testified that he could no longer work with Hendrickson.

Although this is not sufficient to show "actual, material, and substantial disruption, " defendants are not obligated to do so. Even without concrete examples of disruption, Hendrickson's speech clearly destroyed working relationships with some of Hendrickson's superiors, against whom Hendrickson's accusations were directed, and threatened to hinder the operation of his department. Defendants have therefore met their burden under the Connick standard. Hendrickson's First Amendment claim must fail.

B. Right To Petition Government For Redress Of Grievances

Hendrickson had a right, under the MOU, to seek redress of grievances through a specified procedure and availed himself of that right. To the extent that

Hendrickson's claim is founded upon his employer's alleged retaliation against him for use of those procedures, Hendrickson does not explain how his retaliation claim is actionable under Section 1983. The Ninth Circuit has recognized that contractual rights can be actionable under Section 1983, where the interest rises to the level of entitlement protected by the Due Process Clause. San Bernardino Physicians' Services Medical Group v. County of San Bernardino, 825 F2d 1404, 1408-09 (9th Cir. 1987). However, the court also cautioned that not every interference with contractual rights is actionable: "[i]t is neither workable nor within the intent of Section 1983 to convert every breach of contract claim into a federal claim." Id. at 1408. The MOU specifically protects Hendrickson from retaliation for use of the grievance process; his proper recourse is under the MOU.

c. The Void for Vagueness Claim

Plaintiff's final claim under Section 1983 is that he was denied due process rights in that he was not placed on notice that his conduct violated City policies, rules or orders. Plaintiff invokes the void for vagueness doctrine which holds that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law." Connally v. General Construction, 269 U.S. 385, 391 (1926). Civil service employment is a property right of which a public employee may not be deprived without due process. Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974). "Here," plaintiff contends, "there was no rule regarding plaintiff's conduct, let alone a vague rule." Plaintiff's Post Trial Brief at 69.

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Although the void for vagueness doctrine has been invoked mainly in the criminal law context, courts have been willing at least to consider due process challenges to civil service rules affecting discharge. Arnett, 416 U.S. at 158; Bence v. Breier, 501 F2d 1185, 1188 (7th Cir. 1984), cert. denied, 419 U.S. 1121 (1985). However, even a general rule governing discharge will be upheld against a void for vagueness challenge. The Supreme Court in Arnett concluded that a law permitting dismissal or suspension without pay "for such cause as will promote the efficiency of the service" was not unconstitutionally vague. Arnett, supra, 416 U.S. at 159. The Court went on to say that Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection. We do not

believe that Congress was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all. Id. at 159.

Hendrickson's dismissal was governed by the Charter of the City of Santa Ana, which provides that a civil service employee may be dismissed for "reasonable and sufficient cause." Santa Ana Municipal Code (S.A.M.C.) Section 1000. Due process simply does not require any greater specificity.

II. **The Retaliation Claims**

The federal ADEA and the California FEHA prohibit an employer from retaliating against an employee for opposing discrimination prohibited under those statutes. Both the ADEA and the FEHA prohibit age discrimination in employment. Under the ADEA, the employee is protected from retaliation only if (1) he reasonably believes that discrimination exists, and (2) his opposition behavior is reasonable.

1988 Memorandum of Decision at 14 citing Sias v. City Demonstration Agency, 588 F2d 692, 695 (9th Cir. 1978) and Wrighten v. Metropolitan Hospitals, Inc., 726 F2d 1346, 1354-56 (9th Cir. 1984). To establish a prima facie case of retaliation, the plaintiff must show that he engaged in protected activity, that he was discharged and that there was a causal link between the two. If the plaintiff successfully makes a prima facie case, defendants then bear the burden of production to articulate a legitimate, nonretaliatory reason for the discharge. The plaintiff then must show that a discriminatory intent motivated the dismissal. If the plaintiff succeeds at this point, the presumption of discriminatory intent may be rebutted by the defendants' showing that adverse action would have been taken even in the absence of discriminatory intent. Wrighten, 726 F2d at 1354.

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However, "[i]f a plaintiff engages in activity that is not protected by the [ADEA], the analysis is different. A plaintiff's participation in unprotected activity is itself a legitimate, non-discriminatory reason for an employer to take a negative employment action." Id.

The Court ruled in its 1988 Memorandum of Decision that it would construe the FEHA retaliation provision in the same way as the ADEA provision. 1988 Memorandum of Decision at 20. The Court also concluded that Hendrickson had made a prima facie case that he was terminated for engaging in protected opposition activity. 1988 Memorandum of Decision at 16. The termination notice actually listed Hendrickson's charge of age discrimination as one of the grounds for dismissal. The defendants must therefore articulate a legitimate, non-retaliatory reason for the discharge. They can do this by showing that Hendrickson's conduct was not

protected in the Hendrickson either did not reasonably believe that discrimination existed or that his conduct went too far, or by articulating a legitimate reason for the discharge.

A. Reasonableness of Steven Hendrickson's Belief

The Court finds that Hendrickson's belief that he was discriminated against on the basis of age was not reasonable. Age discrimination clearly was not the thrust of his complaint with the City. In all his letters to Sanchez, Perkins, and the Mayor and members of the City Council, he never mentioned this. The inclusion of the age discrimination claim in the Third Step Grievance appears to have been something of an afterthought.

Hendrickson bases his claim of age discrimination on the fact that all the individuals hired on a temporary basis, then subsequently placed in a permanent position in his department were younger

than he. However, many other hires and promotions from within the City involved individuals in their forties and fifties. Of the twenty-one positions for which Hendrickson applied, six were filled by individuals in their forties or fifties. Although plaintiff is not required to show that he had a meritorious claim, the mere fact that a younger person was hired for a particular position does not constitute a reasonable basis for the claim of age discrimination. Hendrickson cannot be expected to have known that a particular position was offered to an older person. But Hendrickson should have known the ages of individuals actually hired.

B. Reasonableness of Hendrickson's Conduct

Since the Court finds that Hendrickson did not have a reasonable belief that he was discriminated against on the basis of age, neither the ADEA nor the FEHA protects him for retaliation against those claims.

The Court therefore does not address whether Hendrickson's conduct was reasonable.

III. **The Memorandum of Understanding**

The MOU also contains a specific provision that employees may not be fired for participation in the grievance process (Exh. 17, Art. XVII, Section 1 at 35). Plaintiff seeks redress based on that provision and the implied covenant of good faith and fair dealing implicit in the MOU. A covenant of good faith and fair dealing is implicit in every contract in California. The covenant imposes on the contracting party the duty not to do anything that will deprive the parties to the contract of its benefits. Harm v. Frasher, 5 Cal.Rptr. 367 (Cal. App. 1960).

However, under the MOU, an aggrieved person is required to seek redress for alleged violations of its terms respecting promotion through the three step grievance process. When the grievance process has

been completed, the individual may then seek further redress in an administrative mandamus proceeding under California Code of Civil Procedure Section 1094.5. With respect to an employee's termination, suspension and demotion, the Personnel Board acts as a local administrative tribunal, and has the power to make final adjudications of matters submitted to it. Santa Ana Municipal Code, Section 9-118(g). English v. City of Long Beach, 35 Cal.2d 155 (1950). Judicial review of the Personnel Board's action may also be pursued through mandamus proceedings under Section 1094.5 See Mendoza v. Regents of the University of California, 144 Cal.Rptr. 117 (1978) (administrative mandamus was proper means to review discharge of university employee where authorities responsible for disciplinary decision exercised adjudicatory powers).

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There is no reason to believe that the Personnel Board could not have adequately addressed Hendrickson's retaliation claim under the MOU. It is not sufficiently clear from the record whether the Personnel Board adjudicated the question of retaliation under the MOU. If it did, Hendrickson's proper recourse is a mandamus proceeding in state court. If it did not, then Hendrickson has not exhausted his administrative remedies. In either event, this Court is not the proper forum in which to address this question.

IV. **Intentional Infliction of Emotional Distress**

To state a cause of action for intentional infliction of emotional distress, Hendrickson must show that (1) defendants intended to inflict emotional distress upon Hendrickson, or knew or should have known that Hendrickson's emotional distress was the likely result of their conduct; (2) defendants' conduct was

extreme and outrageous; (3) Hendrickson suffered emotional distress of "such substantial quantity or enduring quality that no reasonable man should be expected to endure it"; and (4) defendants' behavior was the proximate cause of the emotional distress. See e.g. Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 376, 397 (1970).

Plaintiff has not established that any of the defendants' conduct was outrageous. The defendants responded in a civil manner to what were personal attacks. Firing Hendrickson, by itself, does not constitute outrageous conduct.

V. **Tortious Wrongful Discharge in Violation of Public Policy**

The tort of wrongful discharge for breach of public policy applies only where "the discharge is against public policy and affects a duty which inures to the benefit of the public at large rather than to a particular employer or employee."

Foley, 254 Cal.Rptr. at 217. The public policy basis for the cause of action must be substantial and well-established. Id. at 218 n.11. The thrust of Hendrickson's complaints was that he was wrongfully denied promotion. The fact that the defendants may have violated the Santa Ana Municipal Code in denying him promotion does not implicate the kind of substantial policy issue that this doctrine is designed to protect.

VI. **Conclusion**

Judgment is for defendant on the Section 1983, ADEA, FEHA, intentional infliction of emotional distress, and wrongful discharge claims. The claim for violation of the MOU is left to state court.

Date: January 31, 1991

/s/

Mariana R. Pfaelzer
United States District Judge